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## ADVERSARY POSSESSION.

### A REPLY.

In replying to the able and interesting essay from the pen of Mr. H. C. McDowell, Jr., which appeared in the March number of the REGISTER, entitled "Adversary Possession," the writer does not presume to deny the conclusions reached therein. The object of this article is merely to point out some possible fallacies in the arguments advanced. The question discussed in that article is thus stated:

"When the true title holder is in actual possession of a part of his grant, but outside of the interlock, at the time of the entry of the colorable title holder, does the latter, by an actual possession of a small part of the interlock, gain a prescriptive title to his *pedis positio*, or to all of the land within the interlock?"

The conclusion arrived at is that the colorable title holder gains no title, either at common law or under the Virginia statute, to any part of the interlock other than that in his actual occupancy and use.

Admitting that the common law gives no such right to the colorable title holder, but prefers the title of the senior patentee as to so much of the interlock as is not in the actual adverse possession of the junior grantee, it seems by no means certain that the Virginia statute does not reverse the rule.

The statute reads:

"In controversies affecting real estate, possession of part shall not be construed as possession of the whole, when an actual adverse possession can be proved."—*Virginia Code*, § 2740.

Upon this statute the whole question seems to turn, so far as the rule in Virginia is concerned, and if there is any doubt of the conclusions reached in the discussion, the origin of it is to be found in the interpretation placed upon this statute.

In the article referred to it is said:

"It is evident that the words 'possession of a part' apply to the possession of

the *senior* patentee. The corollary of the statute is—possession of a part shall be construed as possession of the whole, when no actual adverse possession is proved. And if we are to understand that the words 'possession of a part' apply to possession of a junior, it follows that when the senior has no actual possession, a junior, who takes actual possession only outside of the interlock, would thereby acquire title to the whole of his grant. Because 'possession of a part is possession of the whole, when there is no actual adverse possession.' But this is not the law. If it were, the senior could be disseised, without ever having had opportunity of knowing of the ouster. See *Koiner* v. *Rankin*, 11 Gratt. 426, 427, 428. Hence we know that the statute simply means that actual possession of a part of his grant *by the senior* shall not be construed as possession of the whole, when an actual adverse possession *by the junior* can be proved. That is to say, the statute is certainly in affirmation of the common law, and does not (as Judge Baldwin seemed to think) afford any reason for a rule contrary to the great weight of common law authority."

Here it is evident that the statute is construed as applying to the *entire tract*, and as providing that the possession of any part thereof, whether within or without the interlock, shall not be construed as possession of the whole, when an actual adverse possession can be proved. If this be the true construction of the statute, the deductions above given would seem to be just and proper. But since the statute, by its terms, applies "in controversies affecting real estate," and since the only real estate affected by the controversy is the interlock, it is submitted that the more reasonable construction is to apply the statute only in matters relating to the possession of the interlock, leaving out of view the possession of either party outside of the portion affected by the controversy.

So construed, the statute might be thus paraphrased :

"In controversies affecting real estate, possession of part of the *land in dispute* shall not be construed as possession of the whole of such land, when an actual adverse possession thereof can be proved."

By this construction the statute may be applied, as its terms would naturally import, equally to the possession of the junior and of the senior grantee. Thus the fullest effect is given to the language used, and all the cases are reconciled, without involving any legal absurdity such as that adverted to in the quotation above given.

Adopting the same terminology as that used by Mr. McDowell, but necessarily modified in its scope by the interpretation placed upon the statute above referred to, we find that "constructive possession means always a nominal possession [of the interlock, or land in dispute], which must be founded on and connected with a *partial actual* possession [of the interlock]," while "legal seisin, or seisin in law, is

what the true title holder has when he has no actual possession [of the interlock.] ''

These premises would satisfactorily work out the following results, most of which are in accordance with Virginia cases actually decided, and in disproof of which no case can be adduced:

1. If neither party have actual possession of any part of his grant, the elder seisin in law will prevail.

See *Koiner* v. *Rankin*, 11 Gratt. 427; *Cline* v. *Catron*, 22 Gratt. 392.

2. If senior patentee is not in actual possession of any part of his grant, and junior patentee is in possession of part of his, but outside of the interlock, there is no constructive possession of the interlock on the part of either, since there is no actual possession thereof, and hence the elder seisin in law of the senior patentee again prevails.

See *Koiner* v. *Rankin*, 11 Gratt. 427; *Cline* v. *Catron*, 22 Gratt. 392; *Turpin* v. *Saunders*, 32 Gratt. 37–39.

3. If senior patentee has actual possession of any part of the interlock, he will then have constructive possession of all not in actual adverse possession of junior patentee. As to so much of the interlock as is in the actual possession of neither, the superior constructive possession of the senior will prevail over the mere seisin in law, or the inferior constructive possession, of the junior.

See *Overton* v. *Davisson*, 1 Gratt. 224; *Koiner* v. *Rankin*, 11 Gratt. 427; *Cline* v. *Catron*, 22 Gratt. 392; *Turpin* v. *Saunders*, 32 Gratt. 37–39.

4. If junior patentee has actual possession of part of the interlock, and senior patentee has possession of no part of his grant, the junior has a constructive possession of the interlock, while the senior has a mere seisin in law. The constructive possession of the junior will prevail as to the whole interlock.

See *Taylor* v. *Burnsides*, 1 Gratt. 196; *Overton* v. *Davisson*, 1 Gratt. 224; *Turpin* v. *Saunders*, 32 Gratt. 37–39.

5. If senior patentee should enter upon his grant, outside of the interlock, after entry thereon by junior patentee, but before the statute of limitations has barred his claim to any part of the grant, the senior's seisin in law of the interlock is not thereby turned into a constructive possession, for he has no actual possession of the land in dispute. Hence the constructive possession of the junior grantee will prevail

over the mere seisin in law of the senior, and this constructive possession will extend to the whole interlock.

See *Stull* v. *Rich Patch Iron Co.*, 92 Va. 253.

6. The last case is the one under discussion, where the senior grantee is already in actual possession of part of his tract, outside of the interlock, when the junior grantee enters upon and occupies part of the disputed territory. This again would seem to give the junior a constructive possession of the interlock, while the senior has only a seisin in law or right to the possession thereof, and as in the preceding case the constructive possession of the junior should prevail.

That this is the interpretation placed by the Virginia courts upon the statute and upon the meaning of constructive possession, in cases of interlock, will appear from an attentive examination of the language used in several cases.

Thus, in *Taylor* v. *Burnsides*, 1 Gratt. 197, it is said:

"The decisions on the question in other States, founded upon general reasoning, I regard as inapplicable in Virginia, where we have a statute providing that possession of part shall not be possession of the whole, where an actual adversary possession is proved. This statute was surely not passed merely for the protection of squatters; and must have been intended to embrace the case of an actual possession of the rightful owner beyond, and of the adverse claimant within, the limits of the part in controversy. Its policy I regard as wise and salutary; requiring nothing but a reasonable vigilance on the part of the rightful owner, and necessary for the repose of *bona fide* settlers in our extensive regions of wild and uncultivated lands. If it should be said that this statutory provision operates both ways, and prevents the junior patentee's possession of part of the land in controversy from being a possession of the whole land in controversy, inasmuch as the older patentee has an actual adversary possession; *I answer that, in the case supposed, the older patentee's actual adversary possession is not of any part of the land in controversy;* and his constructive possession [seisin in law] must yield to the adversary possession of the junior patentee."

It is true that this is mere *dictum.* The object in referring to it is not to show the conclusion reached by Judge Baldwin, but merely to show the construction placed upon the statute, as applying only to the possession of the interlock itself. From the conclusion Judge Stannard dissented, but it does not appear whether he differed with regard to the interpretation of the statute. It must be admitted, however, that he probably did.

Again, in *Cline* v. *Catron*, 22 Gratt. 392, the court distinguishes between the seisin in law, or legal seisin, of the interlock where there is no actual possession thereof, and the constructive possession created

by a partial actual possession thereof. The court says, *per* Anderson, J.:

"The visible occupancy and improvement [by a junior grantee] of part of the land in controversy is an actual possession of the whole to the limits of the *claim* under which it is held, and ousts or intercepts the *legal seisin* incident to the patent. Such possession of the junior patentee is exclusive, unless the elder patentee enters and takes actual possession of a part of the *land in controversy*. In that case the possession of the junior patentee will be restricted to his actual close."

This quotation, by the way, clearly demonstrates that there was no verbal error in the last sentence on page 392, as Judge Staples seemed to think in *Turpin* v. *Saunders*, 32 Gratt. 38, and even as Judge Anderson himself stated in the same case, p. 39.

The sixth deduction above mentioned will even more clearly appear, if we adopt Mr. McDowell's corollary from the statute, which certainly seems to be a reasonable, and even necessary, inference therefrom. He states it in the following terms :

"The corollary of the statute is—possession of part shall be construed as possession of the whole, when no actual adverse possession is proved."

Now it is manifest that if the statute should be construed as if it read:

"In controversies affecting real estate, possession of part of the *land in dispute* shall not be construed as possession of the whole of such land, when actual adverse possession thereof can be proved,"

the corollary drawn therefrom must be modified in like manner. So modified, it would read :

"Possession of part of the *land in dispute* shall be construed as possession of the whole of such land, where no actual adverse possession is proved."

Applying the corollary in this form, it is at once seen that the junior's possession of part of the interlock must be construed as possession of the whole, where no actual adverse possession thereof is proved.

An equally strong objection to the opposing view may be found in the decision in *Stull* v. *Rich Patch Iron Co.*, 92 Va. 253.

The point involved in that case was identical with that now under discussion, save only that the entry of the senior patentee upon his grant was made eight years after the junior patentee had entered upon the interlock, but at least seven years before the former's right of possession was barred by limitation.

It is true the court, in its decision, expressly states that it does not intend to decide what the rule would be, had the senior been in actual possession of part of his tract when the junior entered upon the inter-

lock, preferring to postpone its decision until the point should directly arise. But it is extremely difficult, if not impossible, to discover any solid distinction between the two cases. The senior patentee in *Stull* v. *Rich Patch Iron Co.* was guilty of no negligence in law, since there is no rule that requires a purchaser of land to enter upon it immediately, provided he does not wait so long as to raise a presumption of abandonment. Nor does the statute relating to this question name any particular moment at which the actual adverse possession of another must begin. It does not either actually or impliedly require that it should precede the claimant's possession. It would seem to make no difference, so far as the application of this statute is concerned, whether the adverse possession began before or after that of the claimant.

The two cases are so closely analogous as to leave scanty room for any material distinction between them.

Furthermore, all the objections of inconvenience and possible injustice, which can be made to this view of the subject under discussion, can be applied with equal force to cases like *Stull* v. *Rich Patch Iron Company*. If the reader will take the diagrams used by Mr. McDowell, and make the Rich Patch Iron Company represent the senior patentee (A), and Stull represent the junior patentee, every fraud, injustice or inconvenience there shown to be possible is equally possible as against the Iron Company. Yet the court in that case decided in favor of the junior patentee and against the Company.

In the decision of *Stull* v. *Rich Patch Iron Company*, the court seems to have made a considerable stride toward the solution of the question.

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